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No. 289

In the Supreme Court of the United States

OCTOBER TERM, 1958

PHILIP J. MARON, Executor of the Estate of C. Herman Scherf, deceased, PETITIONER

v.

WILLIAM P. ROGERS, Attorney General of the United States, as successor to the Alien Property Custodian

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

DALLAS S. TOWNSEND,
Assistant Attorney General,

GEORGE B. SEARLS,
IRWIN A. SEIBEL,
Attorneys,
Department of Justice
Washington 25, D. C.

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OPINIONS BELOW

The memorandum opinion of the District Court (J.A. 33-34) is unreported. The opinion of the Court of Appeals (Pet. 1a-6a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1958. The petition for a writ of

certiorari was filed on August 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, in a proceeding under Section 34 of the Trading With the Enemy Act for the payment of a debt claim out of vested property, the executor of a creditor who predeceased the vesting of his debtor's property is entitled to enforce the claim for the benefit of persons who are themselves ineligible as claimants under Section 34.

STATUTE INVOLVED

The pertinent portions of Section 34 of the Trading With the Enemy Act are set forth at pp. 8a-10a of the petition.

STATEMENT

This action was brought under Section 34 of the Trading With the Enemy Act (60 Stat. 925, 50 U.S.C. App. §34) to review the determination of the Deputy Director, Office of Alien Property, which disallowed petitioner's claim for the payment of a debt out of vested property.

The facts, which were admitted for purposes of this proceeding, are as follows: From 1939 until 1950, Hermann Scherf, an American citizen, paid his German brother Alexander's premiums on a life insurance policy issued in 1927 to Alexander by an American insurance company (J.A. 21-22). In 1950,

Hermann died and his executor, petitioner Maron (an American citizen), paid the 1951 premium (J.A. 23-24). Thereafter, respondent vested Alexander's insurance policy (J.A. 2-3) and converted it into cash (J.A. 19). In August of 1951, petitioner filed a claim with the Office of Alien Property, asking that the cash realized from the vested policy be applied to pay the debt alleged to be due Hermann's estate from Alexander for premiums paid since 1939 (J.A. 5-11). So far as here relevant, the beneficiaries of Hermann's estate and the only persons who would benefit from allowing petitioner's claim[1] are Norman and Pia Scherf, both residents and citizens of Germany at all material times (J.A. 21).

The claim was heard administratively on a motion to dismiss (J.A. 17-18). The Hearing Examiner held that Norman and Pia, being residents and citizens of Germany, are ineligible as claimants under Section 34, and that the interposition of the petitioner,

[1] None of Hermann's debts remains unpaid, a reserve has been set up to meet expenses of administration, and there remains in the hands of petitioner about $100,000 of Hermann's estate (J.A. 25). The rights of Hermann's creditors, therefore, are not here involved. Nor are the rights of the other two beneficiaries named in Hermann's will. One, Alexander Scherf, died in 1954 (J.A. 24), and any interest he may have had terminated with his death. The other, Edward Gerhardy, is an American, and no question has been raised concerning his eligibility as a claimant under Section 34. The Office of Alien Property has not denied the claim to the extent that it is asserted on behalf of Gerhardy, and to that extent the claim is still pending.

who as executor would only serve as a mere conduit of any recovery to Norman and Pia, does not give them any greater rights than they would have on their own (J.A. 18-28). On appeal, the Deputy Director of the Office of Alien Property agreed with the Hearing Examiner and denied the claim to the extent that it is for the benefit of Norman and Pia (J.A. 29).

Petitioner sought review in the District Court under Section 34(e) of the Act (J.A. 30-32). On cross motions for summary judgment (J.A. 33), the District Court directed respondent to pay the amount of the claim (J.A. 34-35). The court in a brief memorandum opinion (J.A. 33-34) assumed that the deceased Hermann, and not petitioner, was the debt claimant under the statute and, without discussing whether or not the statutory ineligibility of Norman and Pia (the beneficiaries of Hermann's estate) had any bearing on the outcome, concluded that since Hermann, if living, would have been eligible, petitioner as executor of his estate is entitled to recover to the same extent as Hermann, if living, would have been (J.A. 33-34).

The Court of Appeals reversed. It was of the view that petitioner was the debt claimant under Section 34 and that the extent of his recovery as executor must be measured in terms of those who would ultimately benefit. Since Norman and Pia are the persons who would be paid the proceeds of any recovery, and since they are ineligible, the court held that the

claim was properly disallowed by the Office of Alien Property (Pet. 1a-6a).[2]

ARGUMENT

The question here presented is without general importance. Indeed, there is not a single claim pending which involves the situation, like the instant one, of an American (1) who had been a creditor of an "enemy" whose property was vested, (2) who died before the vesting, and (3) who left his estate to persons not eligible as statutory claimants. Nor is such a situation likely to recur. There is no conflict.[3] Moreover, the decision of the Court of Appeals is correct.

Section 34(a) provides that "Debt claims allowable hereunder shall include only those of citizens of

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[2] The Court of Appeals found it unnecessary to pass on an additional ground of error advanced by respondent. The facts concerning the alleged debt have never been established, and the Hearing Examiner's decision clearly stated that the facts were taken as admitted only for purposes of the motion to dismiss (J.A. 20). Under the scheme of Section 34, respondent argued, the facts should first be tried administratively and the most the District Court in a review proceeding should have done was to reverse and remand, instead of summarily ordering payment.

[3] The conflict asserted by petitioner (Pet. 2, Q. 3; Pet. 10-11) is in substance nothing more than that the court below applied a rule of construction as to Section 34 of the Act which differs from the rule of construction applied by this Court with respect to other sections of the Act. At another point petitioner concedes there is no real conflict, for he states that the case involves a question of law "never decided by this Court . . ." (Pet. 11).

the United States . . . [and] those of other natural persons who are and have been since the beginning of the war residents of the United States . . . ." So far as here relevant, the only persons who would gain from allowing petitioner's claim are Norman and Pia Scherf, the beneficiaries of the estate. But they are citizens of Germany, not of the United States, and both lived in Germany from the start of the war. So, it seems plain that neither would be entitled to recover in his or her own name.

Although petitioner would be an eligible debt claimant in his individual capacity, he is acting here as executor. Under the applicable law of New York—the place of death, probate, and administration—an executor is a mere conduit of the property to the beneficiaries. He holds merely the legal title, but the beneficial interests are owned by those to whom distribution must ultimately be made. *Blood* v. *Kane*, 130 N. Y. 514, 29 N. E. 994; *In re Albright's Estate*, 309 N. Y. 126, 127 N. E. 2d 910. Accordingly, unless we are to impute to Congress a concern with the formal matter of legal title rather than with the actual payment of the money, the petitioner, as executor, should stand in no better position than the beneficiaries to whom he must turn over the money. The courts have applied this same policy in suits brought under Section 9(a) of the Act for the return of vested property. They have measured the extent of the fiduciary's recovery in terms of those who will ultimately be paid the money.[1]

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[1] *Cordero* v. *United States*, 111 F.Supp. 556, 558

The legislative history of Section 34 also shows that what concerned Congress was the nationality and residence of the persons who would actually benefit from the allowance of the claims. According to the Committee reports, if the money was not needed to pay American creditors, Congress preferred that it should be retained "for ultimate disposition in the general public interest."[5] S. Rept. No. 1839, 79th Cong., 2d Sess., pp. 4, 5; H. Rept. No. 2398, 79th Cong., 2d Sess., pp. 9, 11.

Petitioner's reliance on the last sentence of Section 34(a) (Pet. 9) is mistaken.[6] His argument seems to be that, because Hermann (petitioner's decedent) had been a creditor of Alexander, he was also a "debt

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(S.D.N.Y.), aff'd *sub nom. Cordero* v. *Brownell*, 211 F.2d 90 (C.A. 2); *Public Administrator of New York County* v. *McGrath*, 104 F.Supp. 834, 836 (S.D.N.Y.); *Central Hanover Bank & Trust Co.* v. *Markham*, 68 F.Supp. 829, 831 (S.D.N.Y.). See also *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F.2d 848, 853 (C.A. 2), cert. denied, 269 U.S. 583; *Kaname Fujino* v. *Clark*, 172 F.2d 384 (C.A. 9), cert. denied, 337 U.S. 937; *Miller* v. *Schutte*, 287 Fed. 601, appeal dismissed, 263 U.S. 730.

[5] Congress made a disposition of such funds in the War Claims Act of 1948, as amended, 62 Stat. 1240, 50 U.S.C. Appendix Sec. 2001 *et seq.* See *A. Gusmer, Inc.* v. *McGrath*, 196 F.2d 860 (C.A. D.C.), cert. denied, 344 U.S. 831.

[6] The sentence reads as follows:

". . . Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been."

claimant" under Section 34 and, since petitioner was Hermann's legal representative, he was likewise the legal representative of a "debt claimant" under Section 34. There are two basic flaws in this argument. The first is in the assumption that Hermann was the "debt claimant" under Section 34. Hermann, however, had died prior to the vesting of Alexander's property and Section 34 does not come into operation until there is vested property which may be applied to debts "due and owing at the time of such vesting . . . ." Hermann was thus never a "debt claimant" under the meaning of the statute.

There is yet another difficulty. The last sentence of Section 34(a) was carried over from Section 32(a)(1) of the Act.[7] The Committee Reports show that the language was inserted for a purpose entirely unrelated to the question here involved. Rather, the language was inserted to deal with problems relating to the Assignment of Claims Act, 31 U.S.C. 203. See S. Rept. 920, 79th Cong., 2d Sess., p. 3; H. Rept. No. 1269, 79th Cong., 1st Sess., pp. 3-4.[8]

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[7] Section 32 authorizes discretionary administrative returns of vested property to certain classes of "technical" enemies who are ineligible to bring suit. See *Guessefeldt* v. *McGrath*, 342 U.S. 308, 314-315.

[8] The Senate Report states (at p. 3):

"* * * The clause as to successors in interest excludes the possibility of claims being successfully made by assignees who may have purchased the claim. This is consistent with the principles of the Assignment of Claims Act. Persons taking by inheritance, devise, bequest, or operation of law, however, would be permitted to assert their claims; and the term 'operation of law' would include the operation of a foreign statute, transferring claims to a friendly foreign

Petitioner erects a whole series of arguments on the assumption, made repeatedly, that respondent in 1950 no longer had the power to vest German property acquired after 1946 (Pet. 5-6, 9, 17). This assumption is incorrect. *Bantel* v. *Brownell*, 234 F.2d 692 (C.A.D.C.), cert. denied, 352 U. S. 896.[9] In any event, this policy decision as to vesting has nothing at all to do with the problem here presented, the statutory eligibility of debt claimants to recover out of property already vested.[10]

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government, provided such statute were accorded operative effect by the United States Government as a matter of foreign policy. * * *"

[9] The holding to the contrary of the Court of Claims in *Nichaus & Co.* v. *United States*, 153 Fed. Supp. 428, was based on a misreading of the President's letter of July 9, 1951, to the Vice President (97 Cong. Rec. 7762), which ultimately resulted in the Joint Resolution of October 19, 1951 (65 Stat. 451). What actually happened was that early in 1947 the Attorney General and the Secretaries of War and Treasury agreed as a matter of policy, and for the purpose of encouraging the resumption of trade with Germany, that as a general rule property acquired after January 1, 1947, would not be vested in the future. See the Press Release cited in the petition (Pet. 10a). The concurring opinion in the court below (Pet. 4a-6a) erred, we believe, in implying that the relaxation of the vesting policy, a matter of discretion and designed to aid Germany and Germans, made unfair the application of a clear statutory bar to German recovery of debt claims.

[10] There is no support for petitioner's assertion that the Alien Property Custodian has changed his position regarding estate fiduciaries as claimants (Pet. 13). The legislative history cited by petitioner (Pet. 14-15) relates solely to corporations, not to estates.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

DALLAS S. TOWNSEND,
Assistant Attorney General.

GEORGE B. SEARLS,
IRWIN A. SEIBEL,
Attorneys.

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